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No. 97-124

In The

Supreme Court of the United States

October Term, 1996

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, amicus, the Academy of California Adoption Lawyers ("the Academy"), hereby moves for leave to file the attached brief amicus curiae. Petitioner has granted but respondent has refused to grant consent for the Academy to file a brief amicus curiae in support of the petition.

The Academy is a non-profit association of California attorneys who specialize in the adoption of children, both independently and through licensed adoption agencies. Because of its laws favoring birth parent selection of adopting parents and the openness of its adoption procedures, birth parents and potential adopting parents come to California in great numbers both to place and receive children for adoption. California has more adoptions than any other state, over 6,000 per year (excluding stepparent adoption.)

The Academy believes that it is in a position to bring to the Court's attention relevant matters that could not be brought fully to the court's attention by petitioner, particularly the pernicious and chilling effect upon the practice of law and other professions where advertising alone subjects practitioners to personal liability in distant courts – perhaps, as in this case, to a plaintiff who is not

even a client or patient – without regard to other contacts with or activities in the forum.

The Academy, therefore, respectfully requests leave to file the attached brief amicus curiae.

August 12, 1997

Respectfully submitted,

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QUESTIONS PRESENTED

I. Whether advertising in a forum state by a non-resident defendant, in and of itself, having no causal connection with plaintiff's cause of action, is sufficient contact constitutionally to vest the forum with personal jurisdiction over that defendant.

II. Whether communications between a non-resident attorney and his or her forum-resident client pertaining to services rendered outside the forum constitute sufficient contacts constitutionally to vest personal jurisdiction over that attorney in the forum.

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BRIEF AMICUS CURIAE OF THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS IN SUPPORT OF PETITIONER

BRIEF STATEMENT OF THE CASE

Anne Gilmore Conaty, referred to as "Anne", a resident of Huntington, West Virginia, was pregnant out of wedlock by John Woodruff Kessel, referred to as "John". At the end of January, 1991, Anne left West Virginia. In May, Anne decided to place her child for adoption. She knew John was opposed to it.

While Anne and her mother, Eleanor Wolfe Conaty, hereinafter referred to as "Eleanor", were in North Carolina, Eleanor saw and responded to an advertisement for adoption services in "USA Today" by Diane Michelsen, a California adoption attorney. Ms Michelsen referred Eleanor and Anne to petitioner, an adoption attorney in Beverly Hills. Unknown to Anne, petitioner had advertised in the 1991 Huntington, West Virginia, yellow pages and in the national "800" telephone directory. The listings set forth petitioner's name, law office address in California, "800" & "213" telephone numbers, and his specialization in adoptions. There was no causal connection between petitioner's directory listings, any of the events which followed, or with plaintiff's cause of action.

Anne and Eleanor came to Los Angeles about June 1, 1991. Anne gave birth on July 24, 1991. The next day, Anne and her parents met the adopting parents at Cedars-Sinai Medical Center in Los Angeles where Anne personally placed the child with them for adoption. Anne executed a written authorization for them to take the child home to Edmonton and signed guardianship and

adoption documents to be filed in the Alberta Court of the Queen's bench. About two weeks after the birth, John and his lawyers contacted petitioner and demanded information concerning the child. Petitioner, invoking the attorney-client privilege, refused to disclose the information John sought. John located the child during the pendency of the Alberta adoption proceedings, retained counsel to intervene, and unsuccessfully contested the adoption, which was granted. (The child is now, and has at all times since the day after his birth, been in the custody of his adoptive parents.)

John then returned to West Virginia and sued Anne, her parents, her West Virginia-attorney brother, and petitioner for damages. The jury returned verdicts of $2 million in compensatory damages and punitive damages against all defendants, including $5 million against petitioner.

Petitioner objected at the outset to the court's personal jurisdiction on the ground that he lacked sufficient minimum contacts with West Virginia. In response to petitioner's motion John alleged that 1) petitioner had solicited West Virginia business by advertising in the yellow pages, and 2) petitioner's subpoenaed "800" telephone bills reflected several calls to petitioner's number from the West Virginia area code 304. Except for a call from Anne's parents' residence after she had consulted petitioner, John did not specify the identity of other callers or the content or purpose of their calls. It was also not shown whether or how any call from area code 304 derived from petitioner's telephone book listing, or whether any listed call involved petitioner's "doing business" in West Virginia. The Circuit Court of Cabell

County denied Leavitt's motion without explanation. Later, at the trial, the court made it clear that its jurisdiction was based on the telephone book listings.

When John entered his judgment in California under the Sister State Money-Judgments Act, the Los Angeles County Superior Court vacated it, finding that petitioner's contacts with West Virginia were insufficient to support personal jurisdiction in that court.

ARGUMENT

Particularly since this Court, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), upheld a constitutional right of attorneys to advertise their services, members of the Academy (as well as California adoption agencies and other providers of adoption services) often advertise in classified telephone and other directories around the country. The services, however, are rendered primarily in California. Many potential birth or adopting parents come to California from states in which members advertise. Many of them are referred to members of the Academy independent of advertising. Some advertisements generate no responses at all.

In the case at bar, petitioner is a California attorney who advertised his services in the Huntington, West Virginia telephone directory. The client-birth mother was a resident of West Virginia but was referred to petitioner by another California lawyer. She had never seen the petitioner's directory advertisements. Moreover, she left West Virginia before she first contacted the petitioner. The

birth mother gave birth and placed her child for adoption in California with a Canadian adopting couple who had come to Los Angeles to receive the child. Petitioner's telephone directory advertising was his only activity in West Virginia. Nevertheless the Circuit Court of Cabell County held his advertisements sufficient contact to support personal jurisdiction.

Other members of the Academy are similarly situated. They fear that persons, who could be non-clients as in this case, or even persons of whose interest, identity or whereabouts they were unaware at the time their services were rendered, may successfully and unfairly subject them to the jurisdiction of far away courts solely because of advertising and without reference to their other activities within the forum.

Petitioner is the only one of five co-defendants as to whom a jurisdictional question exists. After defendants' petition for appeal was granted, briefs were filed, oral argument heard, and the matter submitted, the Supreme Court of Appeals of West Virginia sidestepped the jurisdictional question altogether by requiring that petitioner post a $1.1 million (originally $7 million) bond, which he could not afford, as a condition of being heard.

Resolving this issue is vital to members of the Academy, and to other lawyers in other specialties throughout the country, who advertise their professional services outside their home states. Attorneys and others are entitled to know whether advertising, in and of itself and with no causal connection with plaintiff's alleged cause of action in a distant forum, can constitutionally subject them to personal jurisdiction.

I. ADVERTISING IN A FORUM STATE BY A NON-RESIDENT DEFENDANT, IN AND OF ITSELF, HAVING NO CAUSAL CONNECTION WITH PLAINTIFF'S CAUSE OF ACTION, IS NOT SUFFICIENT CONTACT CONSTITUTIONALLY TO VEST THE FORUM WITH PERSONAL JURISDICTION OVER THAT DEFENDANT.

In the case at bar, petitioner had never been to West Virginia, had never represented clients or handled an adoption to or from the state, had no "continuous and systematic contacts", and had engaged in no activity there except for yellow pages listings which were in no way connected with his representing Anne or plaintiff's cause of action.

Most modern decisions in this area flow from *International Shoe Co. vs. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Jurisdiction over non-resident defendants falls into two categories:

1) general jurisdiction where the defendant has "continuous and systematic" contacts with the forum, even if the cause of action is unrelated to those contacts, or

2) specific jurisdiction, which involves fewer contacts but requires that there be a "nexus", or causal connection, between those few contacts and the cause of action itself.

See *Federal Insurance Co. vs. Lake Shore, Inc.*, 886 F.2d 654, 660 (4th Cir. 1989).

An analysis of specific and general jurisdiction is found in *Helicopteros Nacionales de Colombia, S.A. vs. Hall*, 466 U.S. 408 (1984). Where a Colombian corporation provided helicopter services in Peru and plaintiffs were survivors of workers killed in a crash there. Suit was brought in Texas, plaintiffs claiming jurisdiction because 1) the contract for the helicopter service in which the crash occurred was negotiated by defendant's chief executive at a meeting in Houston, 2) defendant's pilots were trained in Texas, 3) several helicopters and some spare parts had been purchased in Texas; and 4) defendant received over $5,000,000.00 from bank accounts in Houston. No claim was made that the cause of action was causally connected with defendant's specific Texas contacts.

This Court discussed whether Texas had general jurisdiction by virtue of "continuous and systematic general business contacts sufficient to meet federal due process standards" and found the contacts insufficient. The trip into Texas by the chief executive officer did not constitute "continuous and systematic" contacts. The purchase of helicopters and training of pilots in Texas was insufficient because the cause of action was not related to those transactions. Finally, payment from Texas banks was the unilateral action of a third party, which could not be used to establish a non-resident's contacts with the forum state.

Clearly Helicopteros's contacts with Texas were infinitely greater than this petitioner's contacts with West Virginia.

A number of cases have specifically held that advertising, in and of itself, is insufficient to establish general jurisdiction over a non-resident.

See *Congoleum Corp. vs. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir., 1984):

> "[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert [general] jurisdiction."

Also *Ratliff vs. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir., 1971):

> "When . . . defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume [general] jurisdiction."

In *Circus Circus Hotels, Inc. vs. Superior Court*, 120 Cal. App. 3d 546 (1981), California resident guests of the Circus Circus Hotel in Las Vegas sued in California for property stolen when their hotel room was burglarized. Circus Circus advertised extensively and continuously in California, maintained a toll-free telephone number in California, and received a substantial portion of its business from California customers.

Nonetheless, the Court of appeal held, at page 567:

> "Merely advertising in the forum state together with maintaining an '800' telephone number there confers no general in personam jurisdiction on the forum state to try the culpability of the advertiser's allegedly tortious conduct – occurring elsewhere."

The court went on to note, at page 569, that there was no causal connection, or "nexus" between defendant's advertising and the injury suffered by plaintiff.

Van Pelt vs. Best Workover, Inc., 798 S.W.2d 14, 17 (Tex.Ct.App. 1990), involved a non-resident defendant who had a telephone listing in a Houston phone book. Said the court:

> "In *Wood Manufacturing Company, Inc. vs. Schultz*, (D.Ark. 1985), the Court concluded that a listing in the yellow pages did not make a prima facie showing of personal jurisdiction."

In *Dunham vs. Hunt Midwest Entertainment, Inc.*, 2 Neb.App. 969 (1994), an amusement park's radio and television advertisements and circulation of discount coupons in Nebraska was held to be insufficient contacts.

Drago vs. The Home Insurance Co., 486 So.2d 940, 942 (La.App. 1986), held the fact that a franchisor placed ads in yellow pages on behalf of its franchisees was by itself insufficient to permit exercise of jurisdiction over the franchisor.

Ericson vs. Spore, 618 F.Supp. 1356 (D. Minn, 1985) held that there was no jurisdiction over a Wisconsin bar owner where its only contacts with Minnesota prior to the accident were advertising in a Wisconsin publication which circulated in Minnesota, and there was no assertion that the advertising was connected with the injured party's decision to go to the bar.

In *Reliance Steel Products vs. Watson, et al.*, 675 F.2d 587 (3d Cir., 1981), plaintiff claimed that defendants' advertisement in Martindale-Hubbell, which circulated in

Pennsylvania, was sufficient "contact" to uphold jurisdiction. Not only did the court reject plaintiff's contention, it cited, at page 589, a Pennsylvania Superior Court decision, *Lebkuecher vs. Loquasto,* 255 Pa.Super. 608 (1978), where the court opined:

> "An advertisement seeking business in Missouri, *even had it been in an exclusively Pennsylvania directory* would not, by itself, constitute 'continuous and substantial' business activity." (Emphasis added)

Two Nevada cases, *Munley vs. District Court,* 104 Nev. 492, 762 P.2d 414 (1988), and *Price and Sons vs. District Court,* 108 Nev. 387, 831 P.2d 600 (1992), held that distribution of brochures and advertising flyers throughout Nevada were insufficient contacts.

In his Petition for a Writ of Certiorari, petitioner cites cases purporting to find advertising in and of itself sufficient for jurisdiction. Examination of those cases, however, discloses that far more than the mere appearance of a telephone directory listing was involved and, in each, there was a direct connection, or nexus, between the advertising and plaintiff's cause of action, e.g.

In *Balloon Bouquets, Inc. vs. Balloon Telegram Delivery, Inc.,* 466 N.E.2d 523 (Mass.App. 1984), plaintiff sued for trademark infringement, libel and unfair competition, arising from the out-of-state defendant's advertising. Defendant not only advertised in the forum, it compiled and published a national directory of balloon distributors, and maintained an "800" telephone number in the forum through which, for a fee, it accepted orders for balloons and forwarded them to its subscribers in the

forum. Defendant encouraged subscribers in the forum to display its logo and emblem in their own advertisements. It provided public relations services for subscribers in the forum and offered consulting services and legal assistance. Defendant likewise distributed copies of its quarterly newsletter to balloon delivery dealers in the forum.

In *Parris vs. Garner Commercial Disposal, Inc.*, 253 S.E.2d 29, 34 (N.C. App. 1979), North Carolina plaintiff joined Aetna Life and Casualty Company, Inc., of Hartford, Connecticut, as a defendant in an accident case. Plaintiff sought an injunction alleging that Aetna, as insurer of the defendant, had "a financial interest" in the litigation and was allegedly tampering with the prospective jury by publishing a nationally distributed advertisement urging potential jurors to be conservative in finding liability and assessing damages. In upholding jurisdiction, the court found not only that Aetna was listed in forum telephone directories, but it maintained a toll-free number for forum insureds to call Hartford in event of an accident. Likewise, forum directories indicated general agents of Aetna to contact within North Carolina cities. In addition, Aetna was issuing and extending insurance policies within the forum.

Both *Gregory vs. Grove*, 547 P.2d 381 (Okla., 1976) and *Hull vs. Gamblin*, 241 A.2d 739 (D.C. App. 1968) involved classified directory advertising in Oklahoma and Texas by Washington, D.C. patent search and application firms. In both cases, plaintiffs consulted the D.C. defendants in response to the advertisement and, after much correspondence and communication between the parties and payment of substantial fees by plaintiffs, the patent application was denied. In each case, the court held that

the lengthy communications between the parties and plaintiffs' express response to the advertisement were sufficient contacts to support jurisdiction. Said the *Hull* court, at page 743:

> But for that advertisement, appellee might never have been in communication with appellant.

In the case at bar, petitioner's directory advertising in West Virginia was unrelated to any aspect of plaintiff's cause of action. It could not be said that "but for" the directory listings even one aspect of plaintiff's alleged cause of action would have been affected.

II COMMUNICATIONS BETWEEN A NON-RESIDENT ATTORNEY AND HIS OR HER FORUM-RESIDENT CLIENT PERTAINING TO SERVICES RENDERED OUTSIDE THE FORUM DO NOT CONSTITUTE SUFFICIENT CONTACTS CONSTITUTIONALLY TO VEST PERSONAL JURISDICTION OVER THAT ATTORNEY IN THE FORUM.

A number of cases have held that communications in furtherance of the case by out-of-state counsel handling an out-of-state matter for a forum resident do not constitute minimum contacts for the purposes of personal jurisdiction.

In *Marchant vs. Peoples*, 274 Ark. 33, 623 S.W.2d 523 (1981), a legal malpractice suit was filed in Arkansas against a Texas attorney. Defendant was licensed to practice only in Texas, had no contacts with Arkansas except with plaintiff by telephone or mail, and did not initiate

the contact with plaintiff. (A Mississippi attorney representing plaintiff in a Mississippi action recommended defendant to represent plaintiff in a Texas divorce action.)

The Court concluded, at page 525, that "before us is one isolated contact initiated by an Arkansas resident." The court found that the Texas attorney was hired in Texas to work in Texas, and that he never came to Arkansas and offered no services there. Upon those facts, the court determined that the contacts were insufficient to establish personal jurisdiction.

In *Mayes vs. Leipziger,* 674 F.2d 178 (2d Cir., 1982), a New York plaintiff claimed personal jurisdiction over defendant California attorney because, by virtue of telephone calls and written communications, the California attorney had transacted "business in person" within New York. The court found that defendants never entered New York and that they did not initiate the contact with the New York plaintiff.

In its decision, the court stated that no court has extended the long arm statute to reach a non-domiciliary who never entered New York, who performed services outside New York, and who is alleged to have neglected to perform other services outside of New York. Specifically the court held, at page 185:

> "We do not believe that in these circumstances the New York courts would exercise jurisdiction solely on the basis that the defendants, from California, reported to their New York client and sought the wherewithal (i.e. funds, authority and information) by means of letters and calls to New York to perform their non-New York services."

In *Edmunds vs. Superior Court*, 24 Cal.App. 4th 221 (1994), a California limited partnership retained a Hawaii attorney to represent it in Hawaii litigation. The court held that defendant's actions, in coming to California to represent his California client in a deposition in the Hawaii litigation, in making phone calls and writing letters to and from California, and in accepting payment from the California client, did not establish purposeful availment of the benefits and protections of California law so as to subject the attorney to personal jurisdiction in California.

The court explained California public policy as follows, at page 236:

> "Substantial public policy concerns support our conclusion. Allowing an exercise of California jurisdiction over an out-of-state attorney who represents California clients in an out-of-state action, and who has had the limited degree of contact with California as has Edmunds, would effectively be to penalize out-of-state attorneys by subjecting them to suit here on a highly attenuated theory. Out-of-state attorneys would likely be discouraged from representing California residents in actions in the attorney's home state if malpractice and other actions could readily be pursued in California, based largely on the client's residence here."

In *Shearson Lehman Brothers, Inc. vs. Hughes, Hubbard & Reed*, 902 SW 2d 60 (Tex.Ct.App. 1st Dist. 1995), a New York based investment banking company sued a New York based law firm in Texas for malpractice in connection with offering of Texas limited partnership interests, and large oversale of securities in Texas, necessitating

company rescission of the Texas offering. Defendant had a "national Blue Sky practice" and the work for plaintiff was done from defendant's Los Angeles office.

The court held, at page 65, that defendant law firm was not subject to specific personal jurisdiction in Texas, even though the law firm made two trips to Texas, and communicated by telephone, mail and fax with Texas regulatory agencies, personnel of the partnership of which securities were being offered and the Texas law firm handling the oversale claims against plaintiff.

In *Crea vs. Busby*, 48 Cal.App. 4th 509 (1996) plaintiff brought suit in California against an attorney retained to investigate a possible claim in Oregon. The attorney resided and practiced exclusively in Oregon for 14 years, although he maintained his license to practice law in California. The court held that, notwithstanding communications with the client in California, maintaining a license to practice law in California was insufficient contact to justify the exercise of general jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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